APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JEFFREY EISENBERG, on behalf of Jacob Eisenberg,
Plaintiff-Appellant,
and
ELINOR MERBERG, on behalf of Jacob Eisenberg,
Plaintiff,
v.
MONTGOMERY COUNTY PUBLIC SCHOOLS; PAUL VANCE, DR., Superintendent, in his official and personal capacity, MONTGOMERY COUNTY BOARD OF EDUCATION, Members, in their official and personal capacity,
Defendants-Appellees.
United States of America,
Amicus Curiae.

No. 98-2503

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge. (CA-98-2797-AW)

Argued: June 10, 1999

Decided: October 6, 1999

Before: WIDENER, NIEMEYER, AND TRAXLER, Circuit Judges.

Reversed and remanded with instructions by published opinion. Judge Widener wrote the opinion, in which Judge Niemeyer and Judge Traxler joined.

COUNSEL

ARGUED: Jeffrey Eisenberg, Silver Spring, Maryland, for Appellant. Patricia Ann Brannan, HOGAN & HARTSON, L.L.P., Washington, D.C., for Appellees. Rebecca K. Troth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae. **ON BRIEF:** Maree F. Sneed, Audrey J. Anderson, HOGAN & HARTSON, L.L.P., Washington, D.C.; Judith S. Bresler, REESE & CARNEY, L.L.P., Columbia, Maryland, for Appellees. Bill Lann Lee, Acting Assistant Attorney General, Mark L. Gross, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae.

OPINION

WIDENER, Circuit Judge:

The issue in this case is whether the Montgomery County Board of Education may deny a student's request to transfer to a magnet school because of his race. We hold that it may not.

Jacob Eisenberg appeals the district court's denial of his motion for a preliminary injunction to compel his admittance to the math and science magnet program at Rosemary Hills Elementary School. Jacob originally applied for a transfer to Rosemary Hills Elementary School for the 1998-99 school year, his first grade year, and was denied his request by Montgomery County on May 15, 1998 due to the "impact on diversity." Jacob is currently preparing to enter the second grade at Glen Haven Elementary, his assigned school, based on his residence. On his transfer request application, Jacob identified his racial/ethnic group as "White, not of Hispanic origin," and accordingly, under Montgomery County's

transfer policy, particularly its "diversity profile,"[1] he was not allowed to transfer out of Glen Haven Elementary School. We reverse the district court's order denying Jacob's motion for a preliminary injunction and remand this case for action consistent with this opinion.

I.

Montgomery County educates more than 125,000 elementary and secondary students enrolled at over 183 schools spread throughout 500 square miles. The County has never been subject to a court order for desegregation,[2] rather, Montgomery County by its voluntary efforts dismantled the former segregated school system. One aspect of its efforts included the implementation of magnet school programs,[3] which would attract and retain diverse student enrollment on

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[1] The Superintendent, Dr. Paul L. Vance, stated in his August 6, 1998 letter regarding Jacob's Transfer Appeal that "[t]he diversity profile group ... means that white students cannot transfer out of Glen Haven Elementary School unless there is a unique hardship circumstance."

[2] Likewise, there has never been a judicial finding of a constitutional violation within Montgomery County's educational setting. In 1981, however, the Office of Civil Rights investigated a parent's complaint filed against Montgomery County alleging that it was "resegregating Rosemary Hills Primary School by improperly approving student transfers ... without the approval of the Quality Integrated Education team," thereby failing to prevent minority isolation at Rosemary Hills. Montgomery County's transfer policy at issue here was adopted in response to this complaint. The fact that Rosemary Hills was the subject of the 1981 action is entirely coincidental to, and has no relevance to, the fact that the Rosemary Hills magnet school program is the subject of this case.

[3] Magnet programs offer enriched curricula emphasizing specific areas; e.g., science, math, or a foreign language. In fact, admission to Rosemary Hills magnet school is not based on merit. Montgomery County points out that if Rosemary Hills receives more transfer requests than it has seats, the names of the eligible students are placed in a lottery and selected randomly. *See* County Br. at 9, n.4. This being true, Jacob would not have been eligible for the lottery because he was not allowed to transfer out of Glen Haven based on his race.

a voluntary basis to schools outside the area in which the student lives. A magnet program emphasizing math and science is located at Rosemary Hills Elementary School. Montgomery County permits voluntary transfers from an assigned school to another school under certain circumstances as outlined in its School Transfer Information Booklet.[4]

Montgomery County considers, in stages, several factors in the consideration of a voluntary transfer request: first, school stability;[5] second, utilization/enrollment; third, diversity profile; and last, the reason for the request. All of the

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[4] Throughout its Transfer Booklet and its briefs, Montgomery County uses the terms "county-wide average," "average county-wide range," and in one footnote in its Reply Brief, "one-and-one-half standard deviations," to describe the method used to compare the racial/ethnic student population in each particular school to that of other schools and to the overall racial/ethnic student population enrolled in Montgomery County Public Schools. These terms are interchangeably and indistinguishably used by Montgomery County with no apparent recognition of the ordinary true meanings of each term. For instance, an average is "exactly or approximately the quotient obtained by dividing the sum total of a set of figures by the number of figures." *Webster's Ninth New Collegiate Dictionary* 119 (9th ed. 1985). A range is defined as "the difference between the least and the greatest values of an attribute." *Webster's Ninth New Collegiate Dictionary* 974 (9th ed. 1985); *see also* David W. Barnes, *Statistics as Proof* 77 (1983) (explaining a range as "the distance between the largest and smallest numbers."). A standard deviation "represents the typical [variation] from the mean or expected value for a population (or list of numbers)." David W. Barnes, *Statistics as Proof* 81 (1983). For our purposes in this opinion, we have assumed that each of these terms refers to the actual *percentage* of students in a racial/ethnic group within the student population enrolled in each of the Montgomery County Public Schools, and, as well, the *percentage* of students in each of the various racial/ethnic groups in the student population of the Montgomery County Public Schools, taken as a whole.

[5] Stability refers to whether the assigned school and the requested school are undergoing a boundary change, consolidation, or renovation that requires students to attend school at an alternative site or whether either school is undergoing some other change that requires the enrollment to remain stabilized.

transfer applications are considered concurrently, and if the assigned school and the requested school are ruled stable, the transfer request is reviewed for utilization/enrollment. An underutilized school is operating below 80% capacity and an overutilized school is operating above 100% capacity.

The utilization factor for each school is determined prior to the receipt of transfer requests and is indicated, for each school in the system, in the Transfer Booklet. Overutilization or underutilization may affect a transfer request, in fact, Montgomery County states that these transfer request(s) usually will be denied.[6] Along with utilization, enrollment is considered to ensure that schools remain within the preferred range of enrollment.[7] If these factors are not a concern, Montgomery County looks to the diversity of the student body of the assigned and the requested schools.

A. *Diversity Profile*

According to the Transfer Booklet, "[t]ransfers that negatively affect diversity are usually denied." Students are identified according to their racial/ethnic group: African American, Asian, Hispanic, and White. Montgomery County compares the countywide percentage for each racial/ethnic group to the percentage of each group attending a particular school, and also determines whether the percentage of each racial/ethnic group in that school has either increased or decreased over the past three years. Based on that information, Montgomery County then assigns to each racial/ethnic group within each school a diversity category.[8]

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[6] Each school has an "0" or a "U" or a blank space (if the utilization is optimal).

[7] The preferred range of enrollment refers to the number of classes of students per grade for elementary schools. For example, 2 to 4 classes of students per grade is preferred in elementary schools. If a school with sufficient capacity fails to meet [has fewer classes than] the preferred range, transfers out of that school are usually not permitted.

[8] If the percentage of the identified racial/ethnic group within a school is within the countywide percentage for that group and is expected to

Categories 1 and 2 are reserved for the racial/ethnic group populations within a school, the percentages of which are higher than the countywide percentage for that particular group. Category 1 refers to racial groups, the percentage of which is higher than the countywide percentage for that group and has increased over time rather than moved closer to the countywide percentage. Transfers usually will not be permitted by a student into a school with a designated category 1 for his racial/ethnic group because his racial/ethnic group percentage at that requested transfer school is already higher than the countywide percentage. Category 2 refers to racial/ethnic populations which, although higher than the countywide percentage, have tended to decline over time. Some transfers are permitted into this group. Categories 3 and 4 indicate a racial/ethnic percentage within a school that is below the countywide percentage. Category 3 is reserved for those racial/ethnic groups, the percentage of which has tended to decline over time; while category 4 includes those populations the percentage of which has tended to increase. For example, "if a particular school has had a declining white enrollment over the preceding three year period and is substantially below the average [c]ounty-wide enrollment of white students [a Category 3], the District may restrict transfers of white students out of that school because they would contribute to that school becoming racially isolated."[9] County Br. at 7.

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remain the same for the near future, that racial/ethnic group will not be assigned a diversity category.

[9] Jacob faced this very situation. Glen Haven, his assigned school, and Rosemary Hills, his requested school, had the following notations for utilization and for diversity profile:

School	*Utilization*	*African-American*	*Asian*	*Hispanic*	*White*
Glen Haven	Overutiliz.	1		1	3
Rosemary Hills			3		

As is the County's, the diversity profile for each school is reevaluated and adjusted annually.

B. *Jacob's Transfer Application*

In March of 1998, Jacob's parents submitted a request that he be transferred from Glen Haven to Rosemary Hills to begin the first grade, reasoning that Jacob's "personal and academic potential" would benefit from the school's math and science emphasis. His transfer request was approved by his kindergarten teaching team. Jacob, as a white student, was part of a category 3 group at Glen Haven Elementary School because at the time of Jacob's transfer request, Glen Haven's student body was 24.1% white compared to the Montgomery County-wide percentage of 53.4%, and the white enrollment at Glen Haven dropped from 38.9% in 1994-95 to 24.1% in 1997-98. See *Eisenberg v. Montgomery County Public Sch.*, 19 F. Supp. 2d 449, 451 (D. Md. 1998). On May 15, 1998, his transfer was denied. The sole reason given by Montgomery County for the denial was "impact on diversity," that is to say because Jacob was white. Jacob did not demonstrate a "unique personal hardship"[10] to obtain an exemption from the denial based on the negative impact on diversity. The Eisenbergs submitted their appeal first to the Superintendent, and then to the Board of Education, which denied the transfer request on August 26, 1998.

Jacob's parents sought declaratory and injunctive relief as well as damages on behalf of Jacob in the district court under 42 U.S.C. § 1983, the Equal Protection Clause, and under 42 U.S.C. § 2000(d). The district court denied the Eisenbergs' motion for a preliminary injunction on September 9, 1998 on

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10 Five white students, out of 19 who applied, were permitted to transfer out of Glen Haven for the 1998-99 school year on a personal hardship basis. Four of these transfers were permitted because the transferring student had a sibling already attending the requested school.

the basis that the Eisenbergs made an insufficient showing of likelihood of success on the merits.[11]

The district court concluded that Montgomery County's asserted interests in both the diversity of its student body and avoidance of potential segregative enrollment patterns were each sufficiently compelling governmental interests to justify the transfer policy's race based classifications under a "strict scrutiny" review applied in Equal Protection cases.[12] *See Eisenberg,* 19 F. Supp. 2d at 453-54. The district court further concluded that the transfer policy had "been designed as narrowly as possible while still furthering [Montgomery County's] stated interests." *Eisenberg,* 19 F. Supp. 2d at 455.

Following the denial of the preliminary injunction, the Eisenbergs appealed to this court and Jacob entered the first

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11 The district court applied the Fourth Circuit's standards for injunctive relief, *see Blackwelder Furniture Co. of Statesville, Inc. v. Seilig. Mfg. Co., Inc.*, 550 F.2d 189 (4th Cir. 1977), and first considered the threat of irreparable harm to Jacob should the court not issue an injunction, and the likely harm to Montgomery County if an injunction should be ordered, and then balanced these two interests. *See Eisenberg*, 19 F. Supp. 2d at 452 (citing *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997)). Next, the court considered the likelihood that the plaintiff would succeed on the merits noting that as the likelihood of harm to the defendant increased, the burden on the plaintiff to demonstrate likelihood of success also increased. *See Eisenberg*, 19 F. Supp. 2d at 452. Finally, the court accounted for the public interest. *See Eisenberg*, 19 F. Supp. 2d at 452.

In this instance, the district court concluded that the balance of hardships favored Montgomery County, though only slightly. Thus, the court looked to the Eisenbergs to make a strong showing regarding their likelihood of success on the merits. Finding none, the district court denied their motion for preliminary injunction.

12 The district court said that it applied the strict scrutiny review fashioned in *Richmond v. Croson,* 488 U.S. 469, 493 (1989) (plurality opinion). "A challenged policy or decision can survive such 'strict scrutiny' review only if it is justified by a 'compelling governmental interest' and is 'narrowly tailored' to accomplish that goal." *Eisenberg,* 19 F. Supp. 2d at 452.

grade at his assigned school, Glen Haven. We review the denial of the preliminary injunction *de novo* since the district court based its decision solely on a premise and interpretation of the applicable rule of law and the facts are established. *See Williams v. United States Merit Sys. Protection Bd.*, 15 F.3d 46, 48 (4th Cir. 1994).

II.

"Race is the perpetual American dilemma." J. H. Wilkinson, III, *From* Brown *to* Bakke 8 (1979). Once again, we find ourselves addressing a most difficult issue in the familiar setting of our public schools. The facts also appear all too familiar - a child has been denied access to a state funded educational opportunity because of the color of his skin.[13] In this case there is no denial that racial classifications result in the denial of a certain number of transfers because Montgomery County fears racial imbalance within its schools, and to combat this potential problem, Montgomery County employs a race-conscious nonremedial transfer policy which amounts to racial balancing.

A.

Initially, the district court erred when it failed to adhere to, or even to mention, the presumption against race based classifications. See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only on extraordinary justification."). In *Podberesky v. Kirwan, (Podberesky II)*, a case involving an exclusively African-American scholarship program at the University of Maryland, we emphasized that presumption and "the

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[13] Although the Montgomery County transfer policy uses the same method in considering all students within all racial/ethnic groups, at the individual school level, an African American student may be denied access due to his category designation, where a White student would be granted his transfer request, and vice versa.

constitutional premise that race is an impermissible arbiter of human fortunes," even when using race as a "reparational device" or as a "remedial measure" for past discrimination. 38 F.3d 147, 152 (4th Cir. 1994), *cert. denied, Kirwan v. Podberesky,* 514 U.S. 1128 (1995); *Maryland Troopers Ass'n, Inc. v. Evans,* 993 F.2d 1072, 1076 (4th Cir. 1993). In accordance with that principle, we concluded that government institutions that choose to employ racial classifications face "the presumption that [such a] choice can not be sustained." *Podberesky II,* 38 F.3d at 152. Montgomery County was burdened with this presumption, and although the district court analyzed the transfer policy under strict scrutiny review, it failed to take the presumption into account when it denied Jacob's request for a preliminary injunction. *There is nothing in the record to overcome this presumption.*

B.

It is undisputed that the transfer policy considers race as the sole determining factor, absent a "unique personal hardship," if the assigned school and the requested school are both stable and their utilization/enrollment factor are acceptable for transfers. While whites and non-whites are not singled out for different treatment, they are all subject to being denied a transfer request solely on the basis of their race. Any racial classification, including that present here, must survive strict scrutiny review; failing such review manifests a violation of Jacob's constitutional rights.[14] *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995). Strict scrutiny review requires the racial classification to serve a

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[14] In its review of Jacob's asserted irreparable harm, the district court stated that, if proven, a violation of Jacob's constitutional rights constitutes per se irreparable harm. *See Eisenberg*, 19 F. Supp. 2d at 452 (citing *Johnson v. Bergland,* 586 F.2d 993, 995 (4th Cir. 1978); *Henry v. Greenville Airport Comm'n,* 284 F.2d 631, 632-33 (4th Cir. 1960)). The district court found the irreparable harm to be slight and balanced the hardships in favor of Montgomery County.

compelling governmental interest and be narrowly tailored to achieve that interest. *See Adarand,* 515 U.S. at 227. The diversity profile factor of the transfer policy employs such racial classifications which "are simply too pernicious to permit any but the most exact connection between justification and classification." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

The district court's determination that the Eisenbergs did not have a strong likelihood of success on the merits stemmed from its strict scrutiny review. The district court labeled its review as exacting and determined that each of the two interests advanced by Montgomery County were sufficiently compelling; the first interest in avoiding the creation of segregative enrollment by racial isolation, and the second interest in promoting a diverse student population. *See Eisenberg,* 19 F. Supp. 2d at 452-55. A further examination of these two interests, and application of this court's reasoning in our recent case regarding racial classifications within an elementary school setting, *Tuttle v. Arlington County Sch. Bd.,* No. 98-1604 (4th Cir. Sept. 24, 1999), reveals that Montgomery County's transfer policy cannot pass constitutional muster.

Moreover, we believe the district court erred in its finding that the Eisenbergs are not likely to succeed on the merits, given that the record demonstrates that Montgomery County's transfer policy is not a remedial race-conscious policy. *See Eisenberg,* 19 F. Supp. 2d at 451-52. Montgomery County has never been under a court order to desegregate, having acted voluntarily to dismantle segregation after the Supreme Court's decision in *Brown v. Board of Educ.,* 347 U.S. 483 (1954). *See Eisenberg v. Montgomery County Public Sch.,* 19 F. Supp, 2d at 451; County Br. at 4. Montgomery County formed a Quality

Integrated Education policy in 1975,[15] and the present transfer policy reflects the Quality Integrated Education policy goals of "avoiding racial isolation and promoting diverse enrollments." *See* County Br. at 4. Notwithstanding that race based classifications have been tolerated in situations where past constitutional violations require race based remedial action, see *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brewer v. School Bd. of City of Norfolk*, 456 F.2d 943 (4th Cir.), *cert. denied, School Bd. of City of Norfolk v. Brewer*, 406 U.S. 933 (1972), we do not face that type of scenario in this case. No court has ever made a finding that Montgomery County Public Schools were not unitary, therefore, the transfer policy does not correct any past constitutional violations.

III.

We next examine whether a compelling governmental interest exists. Although Montgomery County advances two interests, each of which it argues constitutes a sufficiently compelling state interest under strict scrutiny, we are of opinion that, despite the different nomenclature, these interests are one and the same.[16] *See Brewer v. West Irondequoit Cent. Sch. Dist.*, 32 F. Supp. 2d 619, 627 (W.D.N.Y. 1999) (describing the avoidance of racial isolation as "a negatively-phrased expression for attaining the opposite of racial isolation which is racial diversity."). *Tuttle*

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15 Montgomery County asserts that the Quality Integrated Education policy was part of the voluntary effort to support integrated schools. This policy was adopted more than 20 years after *Brown*, and we note that today, over 45 years have passed since *Brown*.

We especially note that at about the time of inception of the transfer policy, 1981, a complaint of the U. S. Department of Education was that the "racial balance" was being upset in certain schools by the county transfer policy. This was prior to *Freeman, infra*, of course.

16 The district court considered each interest separately and concluded that each was sufficiently compelling to justify the questioned policy. *See Eisenberg*, 19 F. Supp. 2d at 453-54.

notes that whether diversity is a compelling governmental interest remains unresolved, and in this case, we also choose to leave it unresolved. *See Tuttle,* No. 98-1604, slip op. at 11-12 (4th Cir. Sept. 24, 1999); *but see Hopwood v. Texas,* 78 F.3d 932, 944 (5th Cir. 1996), *reh'g en banc denied,* 84 F.3d 720 (5th Cir.), *cert. denied,* 518 U.S. 1033 (1996) (holding that "consideration of race or ethnicity by the [University of Texas] law school for the purposes of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."). We will assume, without holding, as the *Tuttle* court assumed,[17] that diversity may be a compelling governmental interest, and proceed to examine whether the transfer policy is narrowly tailored to achieve diversity. *See Tuttle,* No. 981604, slip op. at 11 - 12 (4th Cir. Sept. 24, 1999). No inference may here be taken that we are of opinion that racial diversity is a compelling governmental interest.

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17 The First Circuit assumed that diversity may suffice as compelling without so holding, see *Wessmann v. Gittens,* 160 F.3d 790 (1st Cir. 1998) (declining to decide, in the context of a race based admissions program to one of Boston's better public secondary schools, that diversity can never be a compelling state interest but, instead, determining that it was not narrowly tailored to achieve the desired end). Other circuits have faced related issues in different circumstances, see *Taxman v. Board of Educ. of the Township of Piscataway,* 91 F.3d 1547 (3d Cir. 1996) (refusing to find support in the Court's Equal Protection cases for the notion that diversity or affirmative action were sufficient justifications for making race a factor in the termination decision of one of two equally qualified teachers in a nonremedial situation under Title VII); *Lutheran Church-Missouri Synod v. Federal Communications Comm'n,* 141 F.3d 344 (D.C. Cir. 1998) (holding that "diversity of programming" was an insufficient justification to uphold aspects of the FCC's licensing program (which, in essence, pressured stations to maintain a workforce that mirrored the racial composition of their area) under strict scrutiny's compelling state interest test); *McNamara v. City of Chicago;* 138 F.3d 1219, 1222 (7th Cir. 1998) (referring to the issue as unsettled.). We should not leave the various opinions of the courts of appeal without noting that *Lutheran Church* also reasoned that ". . . it is impossible to conclude that the government's interest, no matter how articulated, is a compelling one." 141 F.3d at 355.

The present case and *Tuttle* are nearly indistinguishable in that both involve public school policies, here the Montgomery County transfer policy and in *Tuttle,* the Arlington County admissions policy for the Arlington Traditional School, in place "not to remedy past discrimination, but rather to promote racial [and] ethnic" diversity. *Tuttle,* No. 98-1604, slip op. at 3 (4th Cir. Sept. 24, 1999). Even in the remedial context, where the state-sponsored program or policy exists to remedy the proximately caused present effects of past discrimination, we have not decided the question of whether diversity is a compelling governmental interest. *See Tuttle,* No. 98-1604, slip op. at 11 n. 7 (4th Cir. Sept. 24, 1999) (citing *Alexander v. Esteep,* 95 F.3d 312, 316 (4th Cir. 1996); *Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207, 213 (4th Cir. 1993) (holding that there was insufficient evidence to prove that race based promotion to achieve racial diversity was a compelling interest); *Podberesky v. Kirwan,* 956 F.2d 52, 56 n.4 (4th Cir. 1992) *(Podberesky* I). Similarly, the Supreme Court has not decided this issue. *See Regents of Univ. of California v. Bakke,* 438 U.S. 265, 269 (1978). We thus do not decide that racial/ethnic diversity is a compelling state interest and proceed to the second part of the strict scrutiny analysis.

IV.

This court's mention of *Bakke* in *Talbert v. City of Richmond*[18] does not lead us to conclude that Montgomery County's use of racial classifications in its transfer decisions is narrowly tailored to the interest of obtaining diversity. In

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18 *Talbert v. City of Richmond,* 648 F.2d 925, 931 (4th Cir. 1981), involved police officer promotion and stated that "the attainment of racial diversity in the top ranks of the police department was a legitimate interest of the city." In *Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207 (4th Cir. 1993), however, we held that legitimate is not necessarily compelling. 10 F.3d at 213 ("We did not determine that the interest was sufficiently 'compelling' to justify racial classifications under the strict scrutiny standard.").

fact, we find that it is mere racial balancing in a pure form, even at its inception. The County annually ascertains the percentage of enrolled public school students by race on a countywide basis, and then does the same for each school. It then assigns a numbered category for *each race at each school,* and administers the transfer policy so that the race and percentage in each school to which students are assigned by residence is compared to the percentage of that race in the countywide system. The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. This is, by definition, racial balancing. As we have only recently held in *Tuttle* "[s]uch nonremedial racial balancing is unconstitutional." *Tuttle, No.* 98-1604, slip op. at 11 & n. 10 (4th Cir. Sept. 24, 1999). Montgomery County's transfer policy, at its inception, was to "further provide[ ] for transfers ... providing that the transfer does not adversely affect the *racial balance* in either the sending or the receiving school." Letter from U. S. Department of Education to Superintendent Andrews, Feb. 28, 1981 (italics added). Although the transfer policy does not necessarily apply "hard and fast quotas,"[19] its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.[20]

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19 The district court pointed to the fact that some transfers are allowed based on "personal hardship and family unity" as evidence that the transfer policy was not rigidly applied. *See Eisenberg,* 19 F. Supp. 2d at 455. This does not detract from the wrong done by denial of a transfer, as here, on the basis of race.

20 Although the district court decided that, in its opinion, diversity was a compelling governmental interest, its finding that "the [county] does not apply hard and fast quotas" is a tacit acknowledgment that if such were the case, its decision would have been different. *Eisenberg,* 19 F. Supp. 2d at 454. The fact that, for any reason personal to him, only a distinct personal hardship can save any student, regardless of his race, from having his transfer request decided on the basis of race, makes it tempting to decide the general question of whether or not diversity is a compelling governmental interest. However persuasive the arguments, and however tantalizing the facts in this case are, we resist that temptation and do not decide the question because it is not absolutely

The Court dealt with the issue of nonremedial racial pupil assignment in both *Pasadena Bd. of Educ. v. Spangler,* 427 U.S. 424 (1976), and *Freeman v. Pitts,* 503 U.S. 467 (1992). In *Spangler,* the Supreme Court affirmed the Ninth Circuit's finding that it would be beyond the remedial authority of the district court to require the annual readjustment of school attendance zones to counteract changes in the racial makeup of the schools.[21] *See Spangler,* 427 U.S. at 436. In the Ninth Circuit's subsequent opinion in *Spangler v. Pasadena Bd. of Educ.,* the court recognized the Supreme Court's emphasis on the idea "that when a large percentage of minority students in a neighborhood school results from housing patterns for which school authorities are not responsible, the school board may not be charged with unconstitutional discrimination if a racially neutral assignment method is adopted." 611 F.2d 1239, 1244 (9th Cir. 1979). Thus, in the situation before us, if racial isolation, meaning low or high percentages of either racial minorities or non-minorities may be feared because transfer requests are granted to students when the assigned and requested schools are both stable and at appropriate utilization levels, any found racial imbalance would not be a vestige of a prior de jure system. If racial imbalance occurs in some of the Montgomery County schools because students like Jacob, for example, are permitted to transfer to magnet schools to get a better education, any racial or ethnic imbalance is a product of "private choices [and] it does not have constitutional implications." *Freeman v. Pitts*, 503 U.S. 467, 495 (1992).

In *Freeman,* racial disparities surfaced because of great growth in the DeKalb area after 1986; from 70,000 to 450,000 and the attraction of African-Americans to the area

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necessary to our decision. See *Ashwander v. TVA,* 297 U.S. 288, 341, 346-47 (1936) (Brandeis, J., concurring).

21 Clearly, Montgomery County has not been found to initially assign students to schools based on race, rather students are assigned by residence. Nonetheless, Montgomery County is attempting to keep schools racially balanced by controlling and monitoring transfers. Jacob's request to transfer to Rosemary Hills is one of them.

contributed to a racial imbalance within the school district after the district had been declared unitary in the student assignment area. 503 U.S. at 480. In this case, Montgomery County has implemented magnet schools to attract students of all racial/ethnic backgrounds to be a part of a different learning environment. Predictably, students of all backgrounds are attracted to the magnet school and, as a result, racial imbalance may then occur in some other schools, if it occurs at all. A potential racial imbalance does not, however, justify the transfer policy's use of race as a factor to determine eligibility for transfers.[22]

The fact that the "County engages in periodic review ... [and the] diversity profile for each school is reviewed and adjusted" each year to avoid the facilitation and the creation of a racially isolated environment does not make the policy narrowly tailored. *See Eisenberg,* 19 F. Supp. 2d at 455. Instead, it manifests Montgomery County's attempt to regulate transfer spots to achieve the racial balance or makeup that most closely reflects the percentage of the various races in the county's public school population. Periodic review does not make the transfer policy more narrow. Similarly, because a student may be granted a transfer request because he can demonstrate a unique personal hardship[23] does not limit or narrow the transfer policy so that racial balancing is suddenly a narrow fit to achieve diversity. It is true that the racial/ethnic background is not the only factor in transfer request considerations, however, in Jacob's situation, his race was the only factor that led to the denial of his request. Montgomery County admits that it denies transfer requests solely on the basis of race, absent personal hardship, "where the consideration of

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22 Montgomery County is not required to grant transfers, but nonetheless, it may not refuse to grant such requests to achieve a racial makeup in each school mirroring the county's racial makeup.

23 The personal hardship exemption, among other things, refers to allowing a transfer to keep siblings in the same school and ease the burden on families.

the racial/ethnic diversity factor is reached" and the transfer would contribute to racial isolation. County Br. at 8.

In *Tuttle,* one of the reasons for holding that the admissions policy in question in that case was invalid was that it "skew[ed] the odds of selection in favor of certain minorities." No. 98-1604, slip op. at 15 (4th Cir. Sept. 24, 1999). The Montgomery County transfer policy does not allow every applicant for a transfer to be eligible for every available spot. Here Rosemary Hills was stable and was not overutilized and Glen Haven was stable and overutilized, yet spots at Rosemary Hills were foreclosed to Jacob simply because Glen Haven's percentage of white school population would decrease, which would cause a greater departure from the countywide percentage for the white student population. If Jacob had been African-American or Asian or Hispanic, he would have been granted his transfer request from Glen Haven to Rosemary Hills because his transfer would not have caused a racial imbalance at Glen Haven. It does not matter that, as the County argues, "at some schools, African-Americans are generally not allowed to transfer out" and that the "policy does not single out whites, African-Americans, or other minorities," a denial of transfer to African-Americans or other minorities on account of their race is no less unconstitutional than the denial to Jacob was here. An example makes clear the evil of the system in place. Suppose an African-American and an Hispanic student at Travilah Elementary School (J.A. 20) wanted to transfer to Rosemary Hills (J.A. 20) to participate in the magnet program of math and science and get a better education. Their diversity profile numbers being category 3, the same as Jacob's, their transfers would likewise have been refused because of their race. The fact that these two theoretical students would have been unconstitutionally denied a transfer does not ameliorate the fact that Jacob's denial was invalid. As Justice Scalia put it in his concurring opinion in *Adarand:*

> Individuals who have been wronged by such unlawful racial discrimination should be

> made whole; but, under our Constitution, there can be no such thing as either a creditor or debtor race. That concept is alien to the Constitution's focus upon the individual....

515 U.S. at 239.

V.

To summarize, Montgomery County's transfer policy here in question is engaging in racial balancing, which we have just held to be unconstitutional in *Tuttle.* In *Tuttle,* No. 98-1604, slip op. at 13 (4th Cir. Sept. 24, 1999), and *Podberesky v. Kirwan,* 38 F.3d 147, 160 (4th Cir. 1994), we also held that racial balancing was not a narrowly tailored remedy. Therefore, even if we went no further, the complained of action on the part of Montgomery County would have to be invalidated because it was giving effect to an unconstitutional policy.

But that is not all. Added to the racial balancing is the fact that Jacob's transfer request was refused because of his race. As we have pointed out, such race based governmental actions are presumed to be invalid and are subject to strict scrutiny. Nothing in this record overcomes that presumption.

On remand the district court will forthwith enter its preliminary injunction requiring the school authorities in Montgomery County to admit Jacob to the Rosemary Hills Elementary School magnet program to which he had applied. Following that, the district court will enter its final injunction requiring the school authorities in Montgomery County to reconsider the application of Jacob to transfer to the Rosemary Hills Elementary School magnet program without consideration of his race. Such consideration will re-examine that request for admission "as of the date it was made." *Podberesky II,* 38 F.3d at 162.

We are justified in requiring the entry of an injunction finally disposing of this case without an evidentiary hearing because the record clearly establishes the plaintiff's right to an injunction and such a hearing would not have altered the result. *See Lone Star Steakhouse & Saloon v. Alpha of Virginia,* 43 F.3d 922, 938 (4th Cir. 1995). This is so because no fact on which we have based our opinion is challenged and in this case we have the compound constitutional wrongs of an invalid racially based transfer policy sustaining invalid racial balancing.

Our decision is very narrow. We feel that we should point out what is not decided. See *Loving v. Alexander,* 745 F.2d 861, 867 (4th Cir. 1984). We have not enjoined any aspect of the transfer policy of Montgomery County except that it may not consider the race of the applicant in granting or denying the transfer. We have not decided that diversity, as the term is used here, either is or is not a compelling governmental interest. The absence of any rigid academic qualifications for transfer and selection by lot if a surplus of applications, for example, seem to open the opportunity to transfer to magnet schools to all students in the system, without respect to their race or any other qualification except their implicit desire to obtain a better education. Desire is not race based. Nothing in this record would indicate that the other aspects of the transfer policy-stability, utilization, enrollment and personal hardship-are race based, and we do not disturb them.

REVERSED AND REMANDED WITH INSTRUCTIONS

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JEFFREY EISENBERG, et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO.: AW 98-2797
MONTGOMERY COUNTY PUBLIC SCHOOLS, et al., Defendants.	:	

MEMORANDUM OPINION

Presently before the Court is Plaintiff's Motion for Preliminary Injunction. The Court, having considered the motion, the opposition thereto, the arguments of counsel at a hearing in open court, and the entire record, finds that the motion must be denied.

Facts

Plaintiffs Jeffrey Eisenberg and Elinor Merberg bring the present action on behalf of their minor son, Jacob Eisenberg. Jacob is presently in the first grade. Based upon the residence of the family, Jacob is scheduled to attend Glen Haven Elementary School in Montgomery County, Maryland.

The Montgomery County Public Schools ("the District") administers a number of magnet programs in various schools, for among other purposes, to achieve racial diversity in the public schools of the county. The magnet programs offer

enriched curricula. The District has established a math and science magnet program at Rosemary Hills elementary school. The District serves over 125,000 children enrolled at over 183 schools.

The District permits voluntary transfers among its schools. It publishes a transfer booklet which sets forth its policies with regard to transfer approval. Five factors are considered: school stability, utilization/enrollment, diversity profile, and the reason for the request. For the 1998-99 academic year, the District received 3,500 applications for transfer. The majority were granted. Approximately 570 appeals were filed of denials.

On March 30, 1998, the Eisenbergs submitted a request for transfer within the school district to Rosemary Hills Elementary School. The stated reason for the transfer request was that at Rosemary Hills, "we believe the school environment and curriculum offer [Jacob] the best opportunity for realizing his personal and academic potential." On the form, Jacob was identified as a white student.

On May 15, 1998, the transfer was denied. The only reason provided for the denial was "impact on diversity." A timely appeal was filed on May, 28, 1998. Jacob's kindergarten teacher wrote a letter in support of the transfer appeal. A letter of denial was issued on August 6, 1998. Eisenberg next appealed to the Board of Education. This subsequent appeal was also denied.

According to the District, Glen Haven is overutilized and/or enrolled. Based upon the "diversity profile," white students are listed under the category: "No transfers out, transfers in permitted (unless overutilized)." The racial makeup for Glen Haven is 24.1% white, 40.5% African-American, 25% Hispanic and 10.1% Asian, compared to a county-wide enrollment of 53.4% white, 20.3% African-American, 13.2% Hispanic and 12.7% Asian. The white enrollment at Glen Haven dropped from 38.9% in 1994-95 to 24.1 in 1997-98. In anticipation of the 1998-99

school year, 19 white students applied for transfer from Glen Haven. Of these students, 5 transfers were approved on personal hardship grounds, and 4 because siblings were already attending the requested school.

Montgomery County has never been under court order to desegregate its schools.

Mr. Eisenberg, acting pro se, now brings the instant action on behalf of his son seeking declaratory and injunctive relief, as well as damages, under 42 U.S.C. § 1983, for claimed violations of his constitutional rights, and under 42 U.S.C. § 2000(d). Now before the Court is Eisenberg's motion for preliminary injunction, seeking to order the District to admit Jacob to Rosemary Hills.

Discussion

A preliminary injunction is an extraordinary remedy that only should be issued when the Plaintiff clearly establishes its entitlement to such relief. See Manning v. Hunt, 119 F.3d 254, 263 (4th Cir. 1997). The standards for injunctive relief in the Fourth Circuit are well known. In Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manuf. Co., Inc., 550 F.2d 189 (4th Cir. 1977), the Fourth Circuit explained that the most important factors a district court must consider in deciding whether to grant injunctive relief are the threat of irreparable harm to the plaintiff should the Court not issue an injunction, and the likely harm to the defendant if an injunction is ordered. See id. at 196. The district court's first task is to balance these two factors. See Manning, 119 F.3d at 263. After doing this balancing, the court may then consider the third factor, which is the plaintiff's likelihood of success. See id. As the balance of harm moves in favor the defendant, the plaintiff has a greater burden in showing its likelihood of success. See id. Finally, the Court considers the fourth factor, the public interest. See id.

A. BALANCING OF HARDSHIPS

Eisenberg claims a violation of his son's constitutional rights. He maintains that, if proven, his injuries constitute per-se irreparable harm. Eisenberg is correct. *See* Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978); Henry v. Greenville Airport Comm'n, 284 F.2d 631, 632-633 (4th Cir. 1960). The irreparable harm must nonetheless be balanced against the harm to the District. *See* Johnson, 586 F.2d at 995. In this case, the irreparable harm to Eisenberg is slight. He is not being denied access to education - the evidence is that he can receive a very comparable education at Glen View. Moreover, there is substantial potential harm to the District. Given the similarity between Eisenberg's transfer request and the requests of many other students that were denied, the District would likely be unable to deny transfers to any other student should Eisenberg obtain the relief he seeks. As explained later in this Opinion, the possibility that the transfer policy will lead to racial isolation among certain schools in the District is appropriately of paramount to concern to the District, and the inability to prevent this occurrence obviously imposes a hardship. On balance, it appears to the Court that the balance of hardships slightly favors the District. Accordingly, Eisenberg must make a strong showing of a likelihood of success to prevail.

B. LIKELIHOOD OF SUCCESS ON THE MERITS

The Court cannot conclude, however, that the instant action has a strong likelihood of success on the merits. The question presented is as follows: can the District can take race into account in deciding whether to approve voluntary transfer requests within Montgomery County?

Because "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination," Palmore v. Sidoti, 466 U.S. 429, 432 (1984), when government actors take race into account in their decision-making, such racially conscious decisions are subject to exacting scrutiny by the courts. A challenged

policy or decision can survive such "strict scrutiny" review only if it is justified by a "compelling governmental interest" and is "narrowly tailored" to accomplish that goal. Richmond v. Croson, 488 U.S. 469, 493 (1989) (plurality opinion).

The District has advanced two interests which it maintains are sufficiently compelling to justify their policy: avoiding the creation, through District action, of segregative enrollment patterns that might themselves constitute violations of the law, and the promotion of a diverse student population.

The Court will first address the second stated interest. Eisenberg maintains that the diversity interest, standing alone, is not a "compelling governmental interest" - he argues that the only interest sufficient to justify efforts to maintain racial diversity is a history of prior discrimination, which has not been alleged by the District. Citing to Croson, Eisenberg contends that "defendants must demonstrate that its own 'prior discrimination' justifies implementation of the diversity plan." But in Croson, the defendants did not rely upon an interest in diversity to justify the affirmative action plan there considered. *See* Croson, 488 U.S. at 477 ("The plan declared that it was 'remedial' in nature, and enacted 'for the purpose of promoting wider participation by minority business enterprises in the construction of public projects' "). Likewise, the decision of the Fourth Circuit in Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), which Eisenberg also cites for the proposition that a remedial purpose is the only legitimate purpose which may justify the District's actions, never decided the question of whether diversity is a sufficiently compelling interest. See Podberesky v. Kirwan, 956 F.2d 52, 56, fn. 4 (4th Cir. 1992) (opinion before remand) ("[t]he district court did not cite the need for diversity for this program, and it does not appear that UMCP established that the Banneker Program was established with this goal in mind"); *see also*, Alexander v. Estepp, 95 F.3d 312, 316 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1425 (1997) (striking down affirmative action program relying upon

diversity as well as remedial interests, concluding that "even assuming, arguendo, that the asserted interests are compelling, the program is not narrowly tailored"); Maryland Troopers Ass'n v. Evans, 993 F.2d 1072, 1075 (4th Cir. 1993) (reviewing district court finding that "[statistical] evidence of racial discrimination offered by the [defendants] was sufficient to warrant a race-conscious remedy"); Hayes v. North State Law Enforcement Officers Association, 10 F.3d 207, 213 (4th Cir. 1993) (declining to decide whether diversity remains a sufficiently "compelling" rationale).

The Court believes that the diversity interest remains a compelling governmental interest in the context now being considered. In Regents of the University of California v. Bakke, 38 U.S. 265 (1978), a case where the High Court passed upon an affirmative action program at a state-sponsored medical school, Justice Powell wrote that "the attainment of a diverse student body . . . [is] clearly a constitutionally permissible goal for an institution of higher education." Id. at 311-312. This was so for many reasons, including the fact that "[a] great deal of learning occurs informally . . . through interactions among students of both sexes; of different races, religions and backgrounds . . . ." Id. at 312, fn. 48. The importance of a diverse learning environment is at least as important in the context of public grade-school education. "Public secondary schools are of singular importance in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." Wessmann by Wessman v. Boston School Committee, 996 F.Supp. 120, 128 (D.Mass. 1998) (quotation omitted).

While Eisenberg points out that Justice Powell did not enjoy the support of any other Justice with respect to his view in Bakke that diversity is a sufficiently compelling interest, it should be noted that this view has not been ignored by the other members of the court. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 287, 286 (1986) (O'Connor, J., conc.) ("a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the

context of higher education, to support the use of racial considerations in furthering that interest"); Id. at 306 (Marshall, J., joined by Brennan and Blackman, JJ., dissenting) ("the state purpose of preserving the integrity of a valid hiring policy - which . . . sought to achieve diversity . . . for the benefit of *all* students - was sufficient, in this case, to satisfy the demands of the Constitution"); Id. at (Stevens, J., dissenting) ("[i]n the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by a [non-diverse] faculty"). The Court deems the authority more than sufficient to conclude that diversity may be a compelling governmental interest.

Although Eisenberg does cite authority for the proposition that diversity is not a sufficiently compelling governmental interest, Hopwood v. Texas, 78 F.3d 932 (5th. Cir), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); Tito v. Arlington County, Civ. Action No. 97-540 A (E.D.Va. 1997), the Court must respectfully disagree with the conclusion reached by those courts. *See* Wessmann, 996 F.Supp. at 130 (describing the criticism of Hopwood decision).

The District also cites its interest in avoiding the creation, through its own action, of segregative enrollment patterns that might themselves constitute violations of the law. This interest is clearly sufficiently compelling to justify the questioned policy. The District is not required to permit transfers among schools within its district. In allowing the transfers, the District must of course do so without facilitating through its actions private conduct that leads to a discriminatory environment.

The Supreme Court expressed as much in examining a similar circumstance in Croson, 488 U.S. 469. In Croson, a case dealing with the implementation of an affirmative action program for minority contractors, the Supreme Court discussed the effect of extremely low minority membership in local contractors associations as demonstrating

discrimination in the industry. "If the statistical disparity between eligible [minority contractors] and [minority contractor] membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market." Id. at 503.

Likewise, extremely low percentages of minorities, or non-minorities, in certain public schools might raise an inference of discrimination. *See* Swann v. Mecklenberg Bd. of Ed., 402 U.S. 1, 26 (1971). The District obviously has a compelling interest in not facilitating a discriminatory environment though state action. *See* Norwood v. Harrison, 413 U.S. 455, 465 (1973) ("[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish").

The question remains whether the policy was narrowly tailored. The District persuasively argues that the program is narrowly tailored to further their interests. The District notes that its policy does not single out whites, African-Americans, or other minorities. For instance, at some schools, African-Americans are generally not allowed to transfer out. At other schools, white transfers are for the most part not approved. At a substantial number of schools, transfers are approved without consideration of the impact on racial or ethnic makeup of the affected schools.

Moreover, the District does not apply hard and fast quotas in deciding transfer requests. It compares the racial composition of the school with that of the County, and where it finds the percentage of a particular group below the County-wide average at a particular school, the District generally denies transfers out of that school. Significantly, the policy is not rigidly applied - transfers out of a school are permitted even for members of underrepresented groups in the case of great need or hardship. For instance, of the 19 white students that applied for transfers out of Glen Haven

for the 1998-99 school year, 9 were permitted to transfer notwithstanding the increasing racial imbalance at the school.

Additionally, given that the purpose of the plan is to ensure racial and ethnic diversity of the schools of the County, the Court cannot conceive of, and Eisenberg does not suggest, any race-neutral alternatives to the policy.

Eisenberg does contend that the program is not narrowly tailored because race is the only factor considered by the County. Eisenberg points out that even in Bakke, Justice Powell stated that "[t]he diversity that furthers a compelling governmental interest encompasses a far broader array of qualifications and characteristics of which racial origin is but a single though important element." Bakke, 438 U.S. at 315. But it must be remembered that Bakke dealt with admissions to medical school. The present case deals with transfers between first grade classes. It is obviously unlikely that first graders will have extensive resumes which may be weighed and considered in addition to their race in the District's formulation of how to craft diverse classrooms. Notwithstanding the lack of classroom experience and other distinguishing credentials of these students, however, the need for a diverse classroom is equal, if not greater, than in later years. Where children first begin to forge social relationships and interactions with their peers, in the view of the Court the need for diversity is at its greatest. And, again, race is not, the only factor taken into account by the District. Given that personal hardship and family unity exceptions are given without regard to the race of the student, and that transfers are only limited where they would contribute to racial isolation and segregation, it is clear that race is not dispositive.

Finally, the County engages in periodic review of the policies to insure that they are as narrow as possible. Each year, the utilization index and diversity profile for each school is reviewed and adjusted. The transfer policies are likewise closely monitored and updated where necessary.

The ultimate question of whether the program is sufficiently narrowly tailored to survive constitutional scrutiny should obviously await further factual development as to how the policy has, in fact, been implemented. However, for purposes of the present motion the Court must conclude that, on balance, the District's policies have been designed as narrowly as possible while still furthering the District's stated interests.

Accordingly, the Court does not believe that Eisenberg can show a likelihood of success on the merits of his motion.

C. PUBLIC INTEREST

The Court must finally give consideration to the impact upon the public interest. Given the previously discussed interest in diversity in the public schools, the Court cannot say that the denial of the preliminary injunction and the maintenance of the District's policy is contrary to the public interest.

Conclusion

Accordingly, for the reasons here stated, Eisenberg's motion for a preliminary injunction will be denied. An Order consistent with this Opinion will follow.

9-4-98
Date

/s/
Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JEFFREY EISENBERG, et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO.: AW 98-2797
MONTGOMERY COUNTY PUBLIC SCHOOLS, et al., Defendants.	:	

ORDER

In accordance with the Memorandum Opinion, IT IS this 4th day of September, 1998, by the United States District Court for the District of Maryland, Southern Division, hereby **ORDERED**:

1. That Plaintiff's Motion for a Preliminary Injunction [2-2] BE, and the same hereby IS, **DENIED**; and

2. That the Clerk of the Court mail copies of this Order to all parties of record.

/s/
Alexander Williams, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JEFFREY EISENBERG, et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO.: AW 98-2797
MONTGOMERY COUNTY PUBLIC SCHOOLS, et al., Defendants.	:	

DECLARATION OF DR. MARLENE HARTZMAN

1. I am the Director of the Department of Educational Accountability for the Montgomery County Public Schools ("MCPS"). I have held this position since May 1996. I was the Acting Director of the Department of Educational Accountability from July 1995 through May 1996.

2. My undergraduate degree, in Literature, Oral Communications and Education, is from the University of Wisconsin. I also have a Doctoral Degree in Educational Administration from Virginia Polytechnical Institute.

3. As Director of Educational Accountability, I have responsibility for conducting and monitoring implementation of the student transfer policy. While the Board of Education sets policy with respect to student transfers and assignment, I have had substantial involvement, along with my supervisors in the MCPS administration, in implementing the policy and in advising the Board on student enrollment policy issues.

4. MCPS provides educational programs to over 125,000 children enrolled at 183 schools. The system's schools are spread over approximately 500 square miles.

5. In general, students in the District are assigned to school based on their residence. The District generally establishes and maintains attendance area boundaries around schools. Students who reside within those boundaries attend the school appropriate for their grade within their attendance area, unless they are assigned through a special process, such as through a transfer or a special education placement process that requires a placement at a different school.

6. I have verified that the attendance area elementary school for the address of 11015 Cone Lane in Silver Spring is Glen Haven Elementary School, which is within a few blocks of the Cone Lane address. Glen Haven enrolls students in grades pre-kindergarten through five. Jacob Eisenberg has been enrolled as a first grader at Glen Haven for the 1998-99 school year.

7. Glen Haven Elementary School is part of the Albert Einstein High School cluster of schools. A cluster is the term the District uses for a group of one high school and the elementary and middle schools that send students to that high school. Schools in a cluster are located in the same general geographic area. The Albert Einstein cluster is located in the southeastern part of Montgomery County.

8. Exhibit 1 to the Plaintiffs' Complaint in this action consists of the "MCPS School Transfer Information Booklet" for 1998-99, which provides guidance to parents on MCPS' transfer process and policy for applications received in the 1997-98 school year for assignments for the 1998-99 school year, and the current MCPS Regulation JEE-RA on "Transfer of Students." As described in these documents, transfer requests are "batched" or grouped so that the District can evaluate the accumulated impact of the requests to transfer in and out of various schools. Each individual request also is reviewed for the impact of the request on school stability, building utilization, enrollment, racial/ethnic diversity, and

the reason for the request. The District does consider unique personal hardships even where a proposed transfer would be contrary to factors such as building utilization or the diversity profile.

9. Each year, the District develops a diversity profile for each school. This profile compares the racial/ethnic composition of each school to the average County-wide range for that racial/ethnic group, and examines past increases and decreases in that group's population at the school. The diversity profiles are updated annually. A new transfer booklet with updated information on schools is published each year. Diversity profiles are employed in the transfer consideration process to avoid the granting of transfers that would contribute to conditions of racial isolation at schools. Through this process, for example, when the District sees a pattern of white enrollment decline in a school that is below the range of average County-wide enrollment of white students, the District is able to avoid approval of transfers of white students that would contribute to that school declining even further from the County-wide average white enrollment and becoming racially isolated. This process also applies to enrollment of minorities. Thus, if the District sees a pattern of declining African-American enrollment in a school that is below the range of County-wide enrollment of African-American students, the District can avert additional African-American transfers that would contribute to racial isolation.

10. As explained in the MCPS Student Transfer Information Booklet, the race of a student seeking a transfer is only considered if the proposed transfer would contribute to racial isolation at either the sending or receiving school. Racial isolation is considered because "[e]ducation is most effective in a diverse, integrated setting." Thus, one of the purposes of the MCPS transfer policy is to avoid school district action that promotes racial isolation of schools through approval of voluntary transfers from normal attendance zones. For most MCPS schools, race is not a factor at all in considering transfers.

11. Under MCPS' transfer policy, the same standards and procedures apply regardless of the student's race. Thus, neither whites nor non-whites receive different treatment. Whether a transfer will be permitted under the "racial/ethnic diversity" factor depends on the annual MCPS analysis of each schools' existing enrollment and recent trends, the race of the students requesting transfers, the number of students requesting transfers, and the individual reasons advanced in support of the request.

12. Under MCPS' transfer policy, the policy is to be reviewed on an ongoing basis, and has been revised several times since it was first developed.

13. In recent years, the District receives and reviews annually thousands of applications for voluntary transfers between MCPS schools. For the 1998-99 academic year, from February through July 1998, transfer applications for approximately 3,500 students were received. Thus far, the majority have been granted. As of August 17, 1998, MCPS had received and processed 570 appeals of denials of transfer requests.

14. For transfer applications received in the 1997-98 school year for assignments to become effective for 1998-99, Glen Haven Elementary School was given a diversity profile of 1 for African-American and Hispanic students and 3 for white students. This means that African-American and Hispanic students generally were permitted to transfer out but not in, and that white students generally were not permitted to transfer out but were permitted to transfer in to Glen Haven. This is the case because the enrollment at Glen Haven in 1997-98 was 24.1% white, 40.5% African-American, 25% Hispanic and 10.1% Asian, compared to County-wide enrollment for 1997-98 of 53.4% white, 20.3% African-American, 13.2% Hispanic and 12.7% Asian. The white enrollment at Glen Haven has dropped from 38.9% in 1994-95 to 24.1% in 1997-98.

15. For the 1997-98 school year, the racial/ethnic composition of Rosemary Hills was 66% white, 15.9% African-American, 13.8% Hispanic and 4.1% Asian.

16. In anticipation of the 1998-99 school year, 19 white students applied for transfers from Glen Haven Elementary. As of July 30, 1998, five of those students were allowed to transfer on personal hardship grounds, four because older siblings were already at the requested elementary school.

17. It is my understanding that the Montgomery County Public Schools have never been under court order to desegregate. While I was not employed by the District until approximately 24 years after the Brown v. Board of Education decision in 1954, I have always understood that the District voluntarily dismantled segregated schools after that decision.

18. It is my understanding that, in 1980, parent complaints were made to the Office for Civil Rights of the Department of Education concerning the high African-American enrollment at Rosemary Hills and whether transfers approved by MCPS were a cause of the increasing proportion of African-Americans enrolled at that school. The monitoring of transfers for racial/ethnic impact was initiated in response to that concern, as part of an agreement with OCR. See Attachment 1 to this Declaration.

19. On March 30, 1998, Elinor Merberg, the mother of Jacob Eisenberg, submitted a "Request for a Student Transfer from the Home School," seeking to transfer Jacob's first grade assignment from Glen Haven Elementary School to Rosemary Hills Elementary School in the Bethesda-Chevy Chase area. Jacob was identified as white on the Request form. The Eisenbergs claimed no personal hardship in support of the transfer request.

20. MCPS considered but denied the transfer request for Jacob Eisenberg. The transfer and others were denied on the basis of adverse impact on diversity at Glen Haven. Jacob Eisenberg's parents appealed the denial of the transfer

request dated May 28, 1998, which MCPS received that same day. The parents were interviewed as part of the appeal process, as were personnel at Glen Haven and Rosemary Hill. A written report was developed, and the parents were informed by telephone on July 14, 1998, that the transfer was denied. Exhibit 4 to the Complaint is Superintendent Paul L. Vance's August 6, 1998 letter confirming that denial.

21. Jacob Eisenberg's parents appealed Superintendent Vance's decision to the Board of Education of Montgomery County, by letter dated August 7, 1998. The Board is scheduled to consider the appeal at its meeting on August 26, 1998. The first day of school for the 1998-99 school year for public school students in Montgomery County is August 31, 1998.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on August 21, 1998. /s/

Dr. Marlene Hartzman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JEFFREY EISENBERG, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil No. AW-98-2797
MONTGOMERY COUNTY	)	
PUBLIC SCHOOLS, et al.,	)	
	)	
	)	
Defendants.		

DECLARATION OF DR. MARY HELEN SMITH

1. I am currently the associate superintendent of the Office of Instruction and Program Development and have been for the past three years. I have been the Director of the Department of Student, Community and Staff Support for the Montgomery County Public Schools ("MCPS") and the Department of Educational Accountability. I have been employed by MCPS for over 28 years. I began my career in elementary and secondary education at MCPS as a secondary English teacher. I was promoted to Assistant Principal and Principal positions beginning in 1978. In 1983, I was promoted to a supervisory position in one of the MCPS area offices. I served in area offices until 1991, including six months in the area office that serves the part of Montgomery County in which Glen Haven and Rosemary Hills Elementary Schools are located. All of my positions in area offices involved responsibilities for instructional services and support to schools. I became the Director of the Department of Curriculum and Instruction for all of MCPS in 1991.

2. My undergraduate degree is from the University of Maryland. I also have a Master's Degree in English Education from the University of Maryland and a Doctorate in Education with a major in Human Development from the George Washington University.

3. Both in my present position and as Director of the Department of Curriculum and Instruction, I have become fully familiar with the curriculum offered at schools throughout MCPS. All MCPS elementary schools offer the same core curriculum designed to provide an appropriate education for that grade level and to achieve advancement to higher grade levels.

4. As Director of the Department of Student, Community and Staff Support, I had responsibility for developing policy recommendations and procedures relating to community outreach and staff development. I was responsible for using data to analyze program needs and effectiveness, including decisions about allocation of resources to schools.

5. The District has a magnet school program designed to attract students on a voluntary basis to schools outside of their attendance areas and to maintain resident population. Magnet schools offer a specialized curriculum focus or method of instruction to attract parents to enroll and retain their children in those schools. Magnet programs are designed and located in an effort to avoid racial isolation of students in schools by attracting and/or retaining diverse student enrollment on a voluntary basis to schools outside of the area in which students live. Rosemary Hills is a magnet elementary school located in the Bethesda-Chevy Chase area that serves students in grades Prek-k through 2. One of the magnet themes at Rosemary Hills Elementary is science and math.

6. Glen Haven and Rosemary Hills elementary schools provide the same core curriculum. While there is a focus on science and mathematics at Rosemary Hills, and the school has used its discretionary funds for computers and other technology to support the science and mathematics theme, Glen Haven is one of the MCPS elementary schools that will feature a Reading Readiness focus for 1998-99. Extra staff are being provided at Glen Haven to support a student:teacher ratio of 15:1 in daily reading classes. Glen Haven and Rosemary Hills both provide solid, comprehensive and high quality elementary school programs. I have spoken with the Principal of Glen Haven, Dr. Jevoner Adams, and provided her with the information about Jacob attached to the Complaint. We both are confident that Jacob will have a highly successful academic start at Glen Haven.

7. The leadership of MCPS has considered very carefully the educational grounds for avoiding racial isolation and promoting diversity in MCPS schools. I have been part of many such discussions. Children in MCPS live in a community with children of varied racial and national origin backgrounds. MCPS takes very seriously its obligation not to contribute, through granting transfers, to increasing the racial isolation of schools that already are not representative of the County enrollment. I believe, and this view is shared by the Board of Education and leadership of MCPS, that education of children in racially isolated circumstances limits their future functioning in interracial settings and does not adequately prepare them for the real world of the future in which they will have to function.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on August 20, 1998. /s/

Dr. Mary Helen Smith

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JEFFREY EISENBERG, et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO.: AW 98-2797
MONTGOMERY COUNTY PUBLIC SCHOOLS, et al., Defendants.	:	

ORDER

In accordance with the decision dated October 6, 1999 of the United States Court of Appeals for the Fourth Circuit, and for the reasons set forth therein, IT IS this 3rd day of December, 1999, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Plaintiffs' motion for a preliminary injunction requiring the school authorities in Montgomery County to admit Jacob Eisenberg to the Rosemary Hills Elementary School magnet program to which he had applied [2-2] BE, and the same hereby IS, **GRANTED**;

2. That Plaintiffs' demand for a final injunction requiring the school authorities in Montgomery County to reconsider the application of Jacob Eisenberg to transfer to the Rosemary Hills Elementary School magnet program without consideration of his

race BE, and the hereby IS, **GRANTED**, and that such consideration will re-examine that request for admission as of the date it was made;

3. That the Clerk of Court mail copies of this Order to all parties of record.

/s/
Alexander Williams, Jr.
United States District Judge

APPENDIX E

Choice Legislation

Arizona: Ariz. Rev. Stat. § 15-816.01 (1991 & Supp. 1999).

Arkansas: Ark. Code Ann. § 6-18-206 (1999).

California: Cal. Educ. Code § 482909.1 (West 1993).

Colorado: Col. Rev. Stat. § 22-36-101 (1998).

Delaware: Del. Code Ann. tit. 14, § 401 (1993 & Supp. 1998).

Idaho: Idaho Code § 33-1402 (1981).

Iowa: Iowa Code Ann. § 282.18 (West 1996 & Supp. 1999).

Massachusetts: Mass. Gen. Laws Ann. ch.76, § 12B (West 1996 & Supp. 1999).

Minnesota: Minn. Stat. § 124D.03 (West 1993 & Supp. 1999).

New Jersey: N.J. Stat. Ann. § 18A:7F-3 (1999).

North Dakota: N.D. Cent. Code § 15-40.2-02 (1993).

Tennessee: Tenn. Code Ann. § 49-6-3104 (1996 & Supp. 1999).

Utah: Utah Code Ann. § 53A-1a-106 (1997 & Supp. 1999).

Washington: Wash. Rev. Code § 28A.225.220 (1997).

Wisconsin: Wis. Stat. § 118.51 (1999).

Charter School Legislation

Alaska: Alaska Stat. § 14.03.250 (Michie 1998).

Arizona: Ariz. Rev. Stat. § 15-181 (1991 & Supp. 1999).

Arkansas: Ark. Code Ann. § 6-10-116 (Michie 1999).

California: Cal. Educ. Code § 47600 et seq. (West 1995 & Supp. 1999).

Colorado: Colo. Rev. Stat. § 22-30.5-101 (1998).

Connecticut: 36 Conn. Gen. Stat. § 10-66aa (1996 & Supp. 1999).

Delaware: Del. Code Ann. tit. 14, Pt. I, Ch.5 (1993 & Supp. 1998).

District of Columbia: D.C. Code Ann. § 31-2815 (1998).

Florida: Fla. Stat. Ann. § 228.056 (West 1998 & Supp. 2000).

Georgia: Ga. Code Ann. § 20-2-255 (Michie 1996 & Supp. 1999).

Hawaii: Haw. Rev. Stat. § 302A-1182 (1998 & Supp. 1999).

Idaho: Idaho Code § 33-5205 (1981 & Supp. 1999).

Illinois: 105 Ill. Comp. Stat. 5/27A-5 (West 1998).

Kansas: Kan. Stat. Ann. Ch. 72, Art. 19 (1992 & Supp. 1998).

Louisiana: La. Rev. Stat. Ann. § 3971 (West 1982 & Supp. 1999).

Massachusetts: Mass. Gen. Laws ch.71, § 89 (1996 & Supp. 1999).

Michigan: Mich. Comp. Laws § 380.511 (1997 & Supp. 1999).

Minnesota: Minn. Stat. § 120.064 (1993 & Supp. 1999).

Mississippi: Miss. Code Ann. tit.37, ch.28 (1997 & Supp. 1999).

Missouri: Mo. Ann. Stat. § 160.400 (West 1991 & Supp. 1999).

Nevada: Nev. Rev. Stat. § 386.510 (1996 & Supp. 1999).

New Hampshire: N.H. Rev. Stat. Ann. § 194-B:2 (1989 & Supp. 1998).

New Jersey: N.J. Stat. Ann. § 18A:36A-3 (West 1999).

New Mexico: N.M. Stat. Ann. § 22-8A-1 (Michie 1998 & Supp. 1999).

New York: N.Y. Educ. Law § 2853 (McKinney 1998).

North Carolina: N.C. Gen. Stat. § 115C-238.29A (1997).

Ohio: Ohio Rev. Code Ann. § 3314.01 (West 1999).

Oklahoma: Okla. Stat. Ann. tit. 70, § 3-132 (West 1997 & Supp. 2000).

Oregon: 1999 Oregon Senate Bill No. 100 (signed by Governor May 27, 1999).

Pennsylvania: 24 Pa. Cons. Stat. § 17-1701-A (1998).

Rhode Island: R.I. Gen. Laws § 16-77-1 (1996).

South Carolina: S.C. Code Ann. § 59-40-10 (Law. Co-op. 1990 & Supp. 1998).

Texas: Tex. Educ. Code Ann. § 12.101 (West 1996 & Supp. 2000).

Utah: Utah Code Ann. § 53A-1a-502 (1997 & Supp. 1999).

Virginia: Va. Code. Ann. § 22.1-212.6 (Michie 1997 & Supp. 1999).

Wisconsin: Wis. Stat. Ann. § 118.40 (West 1999).

Wyoming: Wyo. Stat. Ann. § 21-3-201 (Michie 1999).